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NOV 28 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-651

In the Supreme Court of the United States

OCTOBER TERM, 1982

SANTA FE ENGINEERS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT (FORMERLY THE UNITED STATES COURT OF CLAIMS)

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a contractor's failure to certify its claim in accordance with Section 6(c)(1) of the Contract Disputes Act of 1978, 41 U.S.C. (Supp. IV) 605(c)(1), is a jurisdictional bar to de novo adjudication by the Court of Claims of a contracting officer's denial of the claim.

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OPINIONS BELOW

The initial opinion of the Court of Claims (Pet. App. A-1 to A-4) and the opinion of the Court of Claims on motion for reconsideration (Pet. App. B-1 to B-2) are not reported.

JURISDICTION

The judgment of the Court of Claims was entered on June 4, 1982. A motion for reconsideration was denied on July 16, 1982 (Pet. App. B-1 to B-2). The petition for a writ of certiorari was filed on October 14, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).[1]

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[1]Two weeks before the petition for a writ of certiorari was filed, 28 U.S.C. 1255(1) was repealed, effective October 1, 1982, by Section 123 of the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25. The new legislation, inter alia, abolished the Court of Claims

STATEMENT

1. In 1976, petitioner was awarded a contract by the Department of the Navy to construct a hospital and related facilities (Pet. App. A-2). In March 1980, petitioner filed with the Navy's contracting officer a "global" claim requesting an overall equitable adjustment of the contract price (*id.* at A-2). The "global" claim purported to be a resubmission of 18 earlier contract disputes decided adversely to petitioner by the contracting officer,[2] plus several new claims (*ibid.*).

2. On May 5, 1981, petitioner, alleging jurisdiction under Section 10(a) of the Contract Disputes Act of 1978, 41 U.S.C. (Supp. IV) 609(a), brought this "direct access" case in the Court of Claims for de novo review of the "global" claim decision (Pet. App. A-2).[3] By order entered July 16, 1982, the court, relying on its earlier decision in *Paul E. Lehman, Inc.* v. *United States*, 673 F.2d 352 (Ct. Cl. 1982), held that it lacked Contract Disputes Act jurisdiction over the new disputes embraced within the "global" claim

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and created a new trial court, the United States Claims Court, and a new court of appeals, the United States Court of Appeals for the Federal Circuit. Appeals from the Claims Court are taken to the Federal Circuit. Review of decisions of the Federal Circuit is available in this Court by writ of certiorari pursuant to 28 U.S.C. 1254(1).

[2]Petitioner appealed each of the 18 adverse decisions to the Armed Services Board of Contract Appeals (ASBCA), which, at petitioner's request, dismissed them without prejudice in anticipation of a future consolidated proceeding on these and any later-filed claims (Pet. App. A-2).

[3]Petitioner simultaneously requested the ASBCA to suspend action on the consolidated administrative case. In the alternative, petitioner asked the Board to consider its Court of Claims petition as its complaint in the consolidated proceeding and provided a copy for that purpose, which the ASBCA accepted (Pet. App. A-2). The ASBCA proceeding was suspended during the pendency of petitioner's Court of Claims action (*id.* at A-2). The ASBCA is now considering whether it has jurisdiction over petitioner's new claims (Pet. 6).

because of the absence of the certification required by Section 6(c)(l) of the Act, 41 U.S.C. (Supp. IV) 605(c)(l) (Pet. App. B-2 n.*).[4] The court otherwise dismissed the petition for review without prejudice, leaving the ASBCA to decide the extent of its jurisdiction over all of petitioner's contract claims, including the ones asserted for the first time in the "global" claim (*id.* at B-2).[5]

ARGUMENT

1. Petitioner's contention (Pet. 5-6) that the Court of Claims erred in holding that the certification requirement of Section 6(c)(l) of the Contract Disputes Act is a jurisdictional prerequisite to a "direct access" lawsuit does not warrant this Court's review. The decision below, rendered by the court with primary authority for interpreting the Contract Disputes Act, is a reasonable interpretation of the statute and does not conflict with the decision of any other court. Moreover, this Court recently denied certiorari on the same question petitioner raises. *W.H. Moseley Co.* v. *United States,* cert. denied, No 81-2323 (Oct. 4, 1982). Petitioner's arguments do not differ significantly from those made in *Moseley* and, thus, do not justify this Court's review.

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[4] 41 U.S.C. (Supp. IV) 605(c)(1) provides in pertinent part:

> * * * For claims of more than $50,000, the contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of his knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable.

[5] In a prior order of June 4, 1982, the Court also ruled that the Contract Disputes Act did not give it jurisdiction over those of petitioner's 18 earlier claims decided by the contracting officer before the statute's effective date (Pet. App. A-4). That holding is not at issue here (Pet. 6).

2. Contrary to petitioner's contention (Pet. 10-12) and as we explained in our Brief in Opposition in *Moseley*,[2] the jurisdictional nature of the certification requirement is fully supported by the legislative history of the Contract Disputes Act. In *Paul E. Lehman, Inc.* v. *United States, supra*, 673 F.2d at 355, the Court of Claims examined that history and concluded that "[u]nless [the certification] requirement is met, there is simply no claim that this court may review under the Act." In particular, the court (*ibid.*; emphasis added) found persuasive the proposal made to Congress by Admiral Rickover to

> [r]equire as a matter of law that *prior to evaluation of any claim, the contractor must submit to the Government* a certification signed by a senior responsible contractor official, which states that the claim and its supporting data are current, complete and accurate. * * *"

See *Contract Disputes Act of 1978: Joint Hearings on S.2292, S.2787 and S.3178 Before the Subcomm. on Federal Spending Practices and Open Government of the Senate Comm. on Governmental Affairs and the Subcomm. on Citizens and Shareholders Rights and Remedies of the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. 21 (1978) [hereinafter cited as *Hearings*]. In adopting Section 6(c)(1) of the Act, Congress used language virtually identical to that proposed by Admiral Rickover. The Court of Claims justifiably concluded that Congress intended the certification requirement to be as stringent as the Admiral had indicated and, hence, to be jurisdictional in nature.

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[2]We are providing petitioner with a copy of our Brief in Opposition in *Moseley*.

Accordingly, the Court of Claims' interpretation is faithful to Congress' intent in passing Section 6(c)(1).[7]

3. Petitioner contends (Pet. 15-17) that the decision below conflicts with two "lines" of Court of Claims cases involving pre-Contract Disputes Act contracts: (1) *Folk Construction Co.* v. *United States*, Ct. Cl. No. 99-80C (Jan. 16, 1981), rehearing denied (Mar. 6, 1981), which held that Contract Disputes Act jurisdiction existed over an uncertified claim filed with the contracting officer *prior* to the statute's effective date (March 1, 1979) and decided thereafter, because the certification requirement was not yet in effect and, thus, the claim was valid when submitted; and (2) *Tuttle/White Constructors, Inc.* v. *United States*, 656 F.2d 644 (Ct. Cl. 1981), which held that the actions of the contractor disclosed a knowing election to litigate its claims before the contract appeals board under the terms of the contract and pre-Contract Disputes Act law, thus foreclosing its opportunity to elect a remedy under Section 16, Pub. L. No. 95-563, 92 Stat. 2391.

Any inconsistency in these decisions is a matter for the court below to resolve.[8] In any event, the decisions are

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[7]Petitioner suggests that the Court of Claims' interpretation of the certification requirement imposes an unreasonable burden upon contractors that frustrates Congress' intent to provide a streamlined claims resolution procedure (Pet. 12-15). Claim certification was designed by Congress to assure that contract claims have some basis in verifiable fact and to encourage settlements. *Hearings, supra*, at 26-35; S. Rep. No. 95-1118, 95th Cong., 2d Sess. 7 (1978). Hence, the requirement of prior certification is wholly consistent with Congress' desire to ensure that only meritorious claims are submitted. Moreover, prior certification is hardly onerous since the contractor need furnish only three simple representations for the claim to be directly reviewable by the Court of Claims.

[8]Petitioner acknowledges that it did not raise this purported "conflict" before the Court of Claims (Pet. 15 n.28). This Court normally will not consider issues that were neither raised nor considered in the lower courts. *United States* v. *Mitchell*, 445 U.S. 535, 546 n.7 (1980).

not in conflict. The holding in *Folk*, even if correct, is restricted to its unique set of facts, which, to our knowledge, has not reappeared in any other Court of Claims case. In *Tuttle/White*, all the court decided was that the contractor had affirmatively chosen its pre-Contract Disputes Act remedies. In dicta, the court discussed the times at which contractors must act to elect Contract Disputes Act coverage. But the timing of the election is a matter wholly distinct from whether the claim itself is valid for Contract Disputes Act purposes, that is, whether it has been properly certified.

4. Also unavailing is the argument (Pet. 17-20) that the decision below unfairly deprives petitioner of its "right" to litigate its new claims before the Court of Claims under the Contract Disputes Act.[9] That "right" exists only to the extent that petitioner complies with the limitations and conditions contained in the statute, which, as a waiver of sovereign immunity, must be strictly construed. *Brookfield Construction Co.* v. *United States*, 661 F.2d 159, 165 (Ct. Cl. 1981), citing *Soriano* v. *United States*, 352 U.S. 270, 276 (1957). The certification requirement is one of the limitations and conditions under which the United States has consented to be sued. Petitioner, by its own omission, failed to comply with that prerequisite and its "direct access" lawsuit accordingly is barred.[10]

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[9]Petitioner states that the ASBCA may refuse jurisdiction over its new claims, thus depriving it of any forum should the Court of Claims decision stand (Pet. 6, 18-20). This assertion is at best speculative since the ASBCA has not ruled on the question (see note 3, *supra*). Moreover, any such ASBCA decision may be appealed in accordance with applicable law. In any event, it is petitioner's obligation to satisfy the jurisdictional prerequisites regardless of the forum.

[10]*Skelly and Loy* v. *United States*, 685 F.2d 414 (Ct. Cl. 1982), on which petitioner relies (Pet. 14, 19), is inapposite. There, the plaintiff submitted an uncertified claim under its post-Contract Disputes Act contract. The contracting officer decided the claim and the plaintiff sought "direct access" in the Court of Claims. Consistent with its rulings

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1982

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in *Lehman* and *Moseley*, as well as here, the court dismissed the suit, holding that it lacked jurisdiction over the uncertified claim. Since the Contract Disputes Act provides the exclusive remedies for claims arising under a post-Act contract, the court, in dicta, suggested the procedure that a contractor might follow to obtain a reviewable decision: resubmit the claim to the contracting officer with a certification and, if the decision is adverse, seek review in accordance with the statute. The court did not, as petitioner states (Pet. 19), "direct" the contractor in *Skelly and Loy* to pursue this course.

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